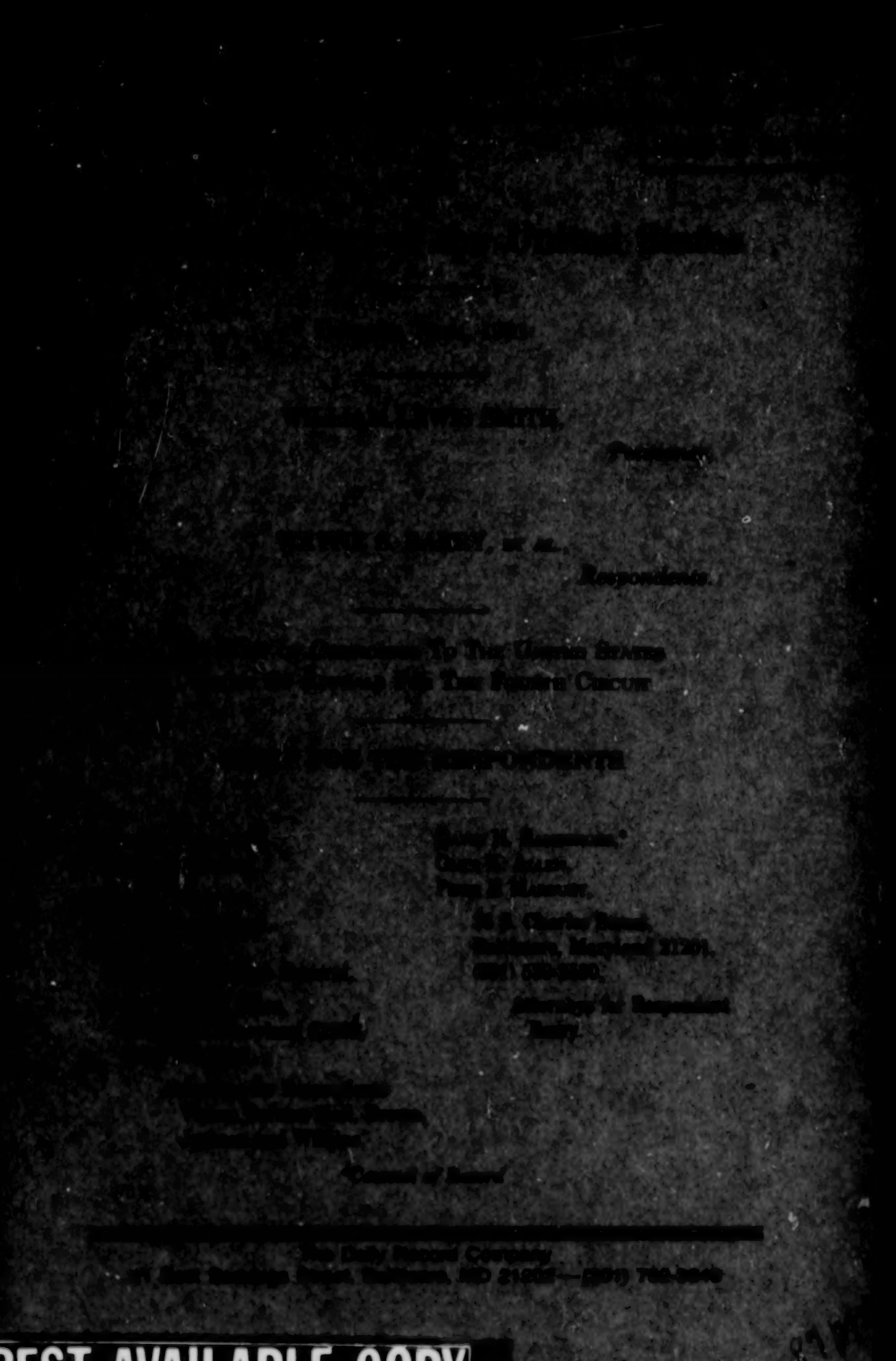

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QUESTION PRESENTED FOR REVIEW

Whether an "Informal Brief" filed by a pro se litigant pursuant to instructions from the Clerk of the Fourth Circuit Court of Appeals may serve a dual function as a notice of appeal?

LIST OF PARTIES TO PROCEEDING BEFORE FOURTH CIRCUIT COURT OF APPEALS

William Lewis Smith, petitioner, was appellant in the appeal before the Fourth Circuit. Respondents Dr. Wayne S. Barry and Maryland Division of Corrections Correctional Officers Robert Victor, Arnold Turner, Bobby R. Hall, David Jackson, Robert Brown, and Lakamon Wilkins were appellees in the appeal before the Fourth Circuit.

Other appellees in the appeal before the Fourth Circuit, not parties to the present proceeding, were Jon P. Galley, individually and in his capacity as Commissioner of the Division of Corrections; George H. Collins, individually and in his capacity as Warden

of the Maryland Penitentiary; Commander Captain Carpenter; Robert Ellis, Psychologist, of the Maryland Department of Corrections; and Daniel Porecki, Psychologist, of the Maryland Department of Corrections.

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No. 90-7477

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

WILLIAM LEWIS SMITH,

Petitioner,

v.

WAYNE S. BARRY, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS

RULES INVOLVED

The pertinent portions of the following rules are reproduced in the appendices to this brief:

1. Rule 3(a), (c) and (d) of the Federal Rules of Appellate Procedure;

2. Rule 4(a) of the Federal Rules of Appellate Procedure;

3. Rule 25(a) of the Federal Rules of Appellate Procedure;

4. Rule 31(a) of the Federal Rules of Appellate Procedures;

5. Form 1 of the Federal Rules of Appellate Procedure;

6. Local Rule 34(b) of the United States Court of Appeals for the Fourth Circuit;

7. Internal Operating Procedure 34.6 of the United States Court of Appeals for the Fourth Circuit;

8. Internal Operating Procedure 46.5 of the United States Court of Appeals for the Fourth Circuit; and

9. 28 U.S.C. § 2074 (1990).

STATEMENT OF THE CASE

Respondents accept petitioner's statement of the case with the following corrections.

First, petitioner's statement of the case does not mention that the Fourth Circuit clerk's office, when it sent blank pre-printed "informal brief" forms to all entities that the clerk's office deemed parties, also sent an "Order to Proceed on Informal Brief." This Order contained instructions as to completing, serving, and filing the informal brief. See Joint Appendix at 11-13; appendix 3 to this brief. The blank informal brief forms and "Order{s} to Proceed on Informal Brief" were sent to the parties on or about April 13, 1988. The "Order to Proceed on Informal Brief" instructed the parties to mail their informal briefs to the court and

to other parties no later than May 4, 1988.

Second, respondents object to the first sentence in the second full paragraph on page 5 of petitioner's statement of the case. This sentence reads: "Barry, represented by counsel, was the first to respond to Smith's appeal: On April 28, 1988, he filed the informal brief form that had been sent to him by the clerk's office." This suggests that Dr. Barry was "respond{ing} to Smith's appeal." In fact, Dr. Barry, like the other respondents, was responding to the Fourth Circuit's "Order to Proceed on Informal Brief."

SUMMARY OF ARGUMENT

Federal Rule of Appellate Procedure 3(a) requires, as a jurisdictional

threshold, the filing of a valid and timely notice of appeal. Mr. Smith did not comply with this requirement. He did file a premature notice of appeal, but, despite being informed by his former attorney that this notice of appeal was void and that he must file a new one, he did not file a new and valid notice of appeal. The Fourth Circuit was thus without jurisdiction to hear Mr. Smith's appeal, unless Mr. Smith submitted a document that was the "functional equivalent" of a notice of appeal. Mr. Smith asserts that the "informal brief" he filed pursuant to instructions from the clerk of the Fourth Circuit was this functional equivalent. There are five reasons why this contention lacks merit.

First, the filing of a notice of appeal and the filing of an appellate brief are separate steps in the

appellate process, each performing a distinct and important function, and each subject to separate detailed requirements in the appellate rules. The appellate rules, accordingly, envision the notice of appeal and the appellate brief as separate filings. To collapse the notice of appeal and appellate brief into a single step would contravene the plain import of the appellate rules.

Second, the functional equivalent doctrine rests, at least implicitly, on the assumption that the content, timing, and choice of recipients of the surrogate notice of appeal reflect the act of the appellant. Under the Fourth Circuit's informal brief procedure, however, the content, timing, and choice of recipients of the informal brief are largely determined by the Fourth Circuit.

Third, the solicitude normally accorded incarcerated pro se litigants is undue in this instance. This solicitude rests on the recognition that incarcerated pro se litigants labor under constraints to which other litigants are not subject; hence, if a pro se litigant does "all he can do" under the circumstances to comply with a requirement, some lenience in interpreting the requirement is appropriate. In this case, however, Mr. Smith did not "do all he could do" to comply with the notice of appeal requirements. Mr. Smith was explicitly informed by his former attorney that his premature notice of appeal was void and that he needed to file a new one. Mr. Smith had abundant time to heed this advice. He did not do so.

Fourth, even were one to assume that Mr. Smith's informal brief may

serve a dual function as a notice of appeal, Mr. Smith has not thereby established appellate jurisdiction. The informal brief must also, as a jurisdictional prerequisite, meet the specificity requirements of Federal Rule of Appellate Procedure 3(c), which requires that, in the case of multiple appealable judgments or orders, a party wishing to appeal must designate from which judgments or orders it is appealing. Mr. Smith's informal brief does not satisfy Rule 3(c)'s requirements.

Finally, Mr. Smith contends that the pleadings submitted by the respondents demonstrate that they understood Smith's wish to appeal and that therefore no prejudice arose from the deficiencies in Smith's notice of appeal. This contention lacks foundation, and in any event would be

legally insignificant. First, the respondents' submission of informal briefs was responsive to instructions from the Fourth Circuit in its "Order to Proceed on Informal Brief" rather than a consequence of adequate notice from Smith regarding his intentions to appeal. Second, and more importantly, Smith's filing of a valid and timely notice of appeal was a jurisdictional requirement. Harmless error analysis is inappropriate. Torres v. Oakland Scavenger Co., 487 U.S. 312, 317 n.3 (1988). The proper focus is on what Smith did or failed to do to perfect his appeal, not on what the other parties might have surmised about Smith's intentions.

Smith in this case did not file a valid notice of appeal or its functional equivalent. The Fourth Circuit therefore lacked appellate jurisdiction,

and its Order dismissing Smith's appeal for lack of jurisdiction should be affirmed.

ARGUMENT

INTRODUCTION

Rule 3(a) of the Federal Rules of Appellate Procedure provides as follows:

> Filing the Notice of Appeal. An appeal permitted by law as of right from a district court to a court of appeals shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. Failure of an appellant to take any other step than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal.

Mr. Smith did not file the timely notice of appeal required by this rule. On March 22, 1988, he did file a notice of appeal, but the motions of Drs. Ellis

and Porecki for judgment N.O.V. were pending at that time and were not ruled on until April 13, 1988. Smith did not thereafter file a new notice of appeal. Because F.R.A.P. 4(a)(4) rendered Smith's premature notice of appeal a nullity, see Acosta v. Louisiana Department of Health and Human Resources, 478 U.S. 251, 253-54 (1986), and because without a valid and timely notice of appeal the Fourth Circuit lacked jurisdiction, see Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 61 (1982), the Fourth Circuit was without jurisdiction to entertain Smith's appeal unless he had submitted a document that was the "functional equivalent" of a notice of appeal. See Torres v. Oakland Scavenger Co., 487 U.S. 312, 316-17 (1988).

Smith contends that the informal brief he submitted on or before May 4,

1988, pursuant to instructions from the clerk of the Fourth Circuit, was this functional equivalent. This contention is without merit. As set forth below, there are five reasons why Smith's informal brief should not be permitted to serve a dual function as Smith's notice of appeal.

I.

PERMITTING MR. SMITH'S INFORMAL BRIEF TO SERVE THE DUAL PURPOSE OF A NOTICE OF APPEAL WOULD COLLAPSE TWO DISTINCT AND IMPORTANT STEPS IN THE APPELLATE PROCESS INTO ONE STEP, IN CONTRAVENTION OF THE APPELLATE RULES

The notice of appeal serves an important role in the appellate process. As this Court noted in Griggs, "[t]he filing of a notice of appeal is an event of jurisdictional significance -- it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects

of the case involved in the appeal." 459 U.S. at 58. Moreover, the requirement of filing a notice of appeal serves the purpose of "set[ting] a definite point of time when litigation shall be at an end, unless within that time the prescribed application has been made and if it has not, [of advising] prospective appellees that they are freed of the appellant's demands." Browder v. Director, Department of Corrections of Illinois, 434 U.S. 257, 264 (1978) (quoting Matton Steamboat Co. v. Murphy, 319 U.S. 412, 415 (1943)).

In accordance with the importance of the notice of appeal, appellate rules 3 and 4 spell out in considerable detail numerous filing, service, and content requirements for notices of appeal. The critical role of the notice of appeal is also reflected in the requirement that the notice of appeal be a filing

separate from other documents, such as appellate briefs, that are filed to accomplish markedly different steps in the appellate process. As the Fourth Circuit in this case noted:

> [A]n appellate brief will not substitute for a notice of appeal, even if it otherwise meets the requirements of Fed. Rules App. P. 3 and 4. The Federal Rules of Appellate Procedure envision the notice of appeal and the appellate brief as two separate filings. To collapse the two into one would, as the Eleventh Circuit implied, "eliminate entirely the requirement for the filing of a notice of appeal."

Joint Appendix at 37 (quoting United States v. Cooper, 876 F.2d 1192, 1196 (5th Cir. 1989), which in turn quoted Florida Women's Medical Clinic, Inc. v. Smith, 706 F.2d 1172, 1173 (11th Cir. 1983)).

There is no support in the text of the appellate rules for Smith's position that his appellate brief should be

permitted to serve also as his notice of appeal. F.R.A.P. 3(c) refers to Form 1 in the appendix of forms as a suggested form of a notice of appeal. Form 1 (attached as Appendix 1 to this brief), manifestly, is a document separate from, and very different from, an appellate brief. Moreover, F.R.A.P. 3(d) requires the clerk of the district court to "serve notice of the filing of a notice of appeal by mailing a copy thereof to counsel of record." F.R.A.P. 31(a), however, sets forth service requirements for appellate briefs different from those in F.R.A.P. 3(d); under F.R.A.P. 31(a) the appellant, not the clerk, is responsible for service. Further, F.R.A.P. 25(a) provides that documents such as notices of appeal filed with the Fourth Circuit clerk's office shall be deemed filed as of receipt, but briefs shall be deemed filed as of the day of

mailing. Were one to assume, therefore, that appellate briefs may serve as notices of appeal, then one must assume also that the appellate rules provide for duplicative service of the appellate briefs when so employed, and that the appellate brief has one date of filing in its capacity as a brief and another in its capacity as a notice of appeal. Such an assumption is inconsistent with the Appellate Rules Advisory Committee's vision of the appellate rules as an integrated set of rules that in an orderly manner cover all steps in the appellate process. See Advisory Committee Notes to 1979 Amendments to the Federal Rules of Appellate Procedure, Note to Rule 1. (Attached as Appendix 2).

Smith, in contending for his position, places his chief reliance on the last sentence in Rule 3(c), which

reads: "An appeal shall not be dismissed for informality of form or title of the notice of appeal." There is no dispute that the Rules Advisory Committee intended by this language to impart a measure of flexibility to the determination whether a particular paper should be accepted as a notice of appeal. Accepting a "Motion for Certificate of Probable Cause" in a habeas corpus proceeding, see, e.g., Holley v. Capps, 468 F.2d 1366 (5th Cir. 1972) (cited as illustrative in 1979 Advisory Committee Note to Rule 3(c)), or a "Petition for Leave to Appeal under 28 U.S.C. § 1292(b)," see, e.g., Cobb v. Lewis, 488 F.2d 41 (5th Cir. 1974) (same), as functional equivalents for notices of appeal may reasonably be seen as within the scope of lenience intended by this language. There is a logical difference, however, between accepting

documents similar to notices of appeal as substitutes for notices of appeal and eliminating the requirement for filing a separate notice of appeal altogether. Accepting a "Petition for Leave to Appeal under 28 U.S.C. 1292(b)" as a notice of appeal is an example of the former; permitting an appellate brief to serve a dual purpose as a notice of appeal is an example of the latter.

Smith contends also that "federal courts have long held that a single document may serve two purposes under the rules." Petitioner's Brief at 15. Whether or not lower courts have so held, of course, is not controlling on this Court. As a matter of fact, however, cases supporting Smith's proposition are a good deal more sparse than Smith's enumeration of cases might suggest. Smith refers to the cases collected in Coppedge v. United States,

369 U.S. 438 (1962) in support of his view. Of the seven cases collected in Coppedge, however, three did not involve a document that was employed for multiple purposes. See Lemke v. United States, 346 U.S. 325 (1953) (notice of appeal filed prior to judgment); Belton v. United States, 259 F.2d 811 (D.C. App. 1958) (letter written to District Court); Williams v. United States, 188 F.2d 41 (D.C. App. 1951) (notice of appeal delivered to prison officials). Two of the others involved petitions for leave to appeal in forma pauperis. See Tillman v. United States, 268 F.2d 422 (5th Cir. 1959); West v. United States, 222 F.2d 774 (D.C. App. 1954). None of the cases involved use of an appellate brief as a notice of appeal.

Similarly, several of the cases cited by Smith in footnote 8 of his brief did not involve a document

employed for multiple purposes, but rather mislabeled or misconceived notices of appeal. See In Re Bertoli, 812 F.2d 136, 138 (3d Cir. 1987) (motion for certification of an interlocutory appeal); San Diego Committee Against Registration & Draft (CARD) v. Governing Board of Grossmont Union High School District, 790 F.2d 1471, 1474 (9th Cir. 1986) (motion for permission to appeal order pursuant to Rule 5(a) of the Federal Rules of Appellate Procedure); Yates v. Mobile County Personnel Board, 658 F.2d 298, 299 (5th Cir. Unit B 1981) ("Petition for Supervisory Writ of Mandamus and Certiorari"). There have in fact been only three instances in which any court has permitted an appellate brief to serve a dual purpose as a notice of appeal. See Allah v. Superior Court of State of California, 871 F.2d 887, 889-90 (9th Cir. 1989);

Finch v. City of Vernon, 845 F.2d 256, 259-60 (11th Cir. 1988) (per curium); Frace v. Russell, 341 F.2d 901, 903 (3d Cir.), cert. denied, 382 U.S. 863 (1965). In none of these cases did the court address the issue that the Fourth Circuit in the present case and the Fifth Circuit in United States v. Cooper, 876 F.2d 1192, 1196 (5th Cir. 1989) found of critical importance: namely, that permitting an appellate brief to serve a dual function as a notice of appeal would, for a class of cases, eliminate the requirement for filing a separate notice of appeal. See also Jurgens v. McKasy, 905 F.2d 382, 385 n.4 (Fed. Cir. 1990) (holding that appellate brief may not serve as notice of appeal and citing United States v. Cooper.)

Smith relies also on Torres v. Oakland Scavenger Co., 487 U.S. 312

(1982). This reliance is misplaced. In Torres, this Court held that the use of "et al." in lieu of naming a party in a notice of appeal, even if it were a harmless error, was not mere excusable "informality," but rather a jurisdictional defect. The Court noted that "[p]ermitting imperfect but substantial compliance with a technical requirement is not the same as waiving the requirement altogether as a jurisdictional threshold." 487 U.S. at 315-16. Torres is precedent for a strict interpretation of F.R.A.P. 3, not for the view Smith advocates.

The essence of the issue presented by Smith's appeal lies in the difference between textual interpretation and textual amendment of the appellate rules. One may well believe that appellate briefs should be permitted to serve also as notices of appeal. The

appellate rules, however, do not provide for this. To read such a provision into the rules would circumvent the constitutionally-based process by which amendments to the appellate rules, in accordance with 28 U.S.C. § 2074, are proposed, reported to Congress, and promulgated. See Houston v. Lack, 487 U.S. 266, 283-84 (1988) (dissenting opinion of Justice Scalia).

This Court rejected this type of judicial amendment in Mohasco Corporation v. Silver, 447 U.S. 807 (1980). There, the respondent presented reasons why the word "filed" should have different meanings in the same section of § 706(c) of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-5(c)). This Court rejected respondent's contentions, noting:

> In the end, we cannot accept respondent's position without unreasonably giving the word "filed" two different meanings

> in the same section of the statute. Even if the interests of justice might be served in this particular case by a bifurcated construction of that word, in the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law.

447 U.S. at 826. See also Hallstrom v. Tillamook County, 110 S.Ct. 304, 311 (1989). This reasoning applies with equal strength to the present case.

II.

BECAUSE THE TIMING, CONTENT, AND RECIPIENTS OF SMITH'S INFORMAL BRIEF WERE DETERMINED LARGELY BY THE FOURTH CIRCUIT AND NOT SMITH, ESSENTIAL PREREQUISITES FOR INVOKING THE FUNCTIONAL EQUIVALENT DOCTRINE ARE LACKING

In Torres, this Court, setting forth the functional equivalent doctrine, stated as follows:

> [I]f a litigant files papers in a fashion that is technically at variance with the letter of a procedural rule, a court may

> nonetheless find that the litigant has complied with the rule if the litigant's action is the functional equivalent of what the rule requires.

487 U.S. at 316-17. As this statement indicates, the functional equivalent doctrine rests on the premise that the filing in question represents the "litigant's action." If, therefore, the filing represents the action of someone other than the litigant, the functional equivalent doctrine is not properly invoked. Such is the case in this instance. To understand this, it is necessary to consider the Fourth Circuit's procedure for filing informal briefs.

Informal briefs are employed in pro se appeals in the Fourth Circuit pursuant to Fourth Circuit Local Rule 34(b) and Fourth Circuit Internal Operating Procedures 34.6 and 46.5. The procedure is not initiated by the pro se

litigant but by the Fourth Circuit Clerk. The Clerk, on learning that the appeal is pro se, begins the process by sending copies of blank pre-printed informal brief forms, together with instructions, to persons the Clerk determines to be parties.

Appendix 3 to this brief demonstrates how this procedure worked in the present case. Appendix 3 is the "Order to Proceed on Informal Brief" and blank informal brief form filed by the Fourth Circuit and sent to Dr. Barry's attorney and all other parties.[1/]

1/ The "Order to Proceed on Informal Brief" is also set forth in the Joint Appendix. Because Smith's appeal is in forma pauperis, however, the "Copies to" list was deleted from the Order in the Joint Appendix. Appendix 3 is a complete version of the Order and blank informal brief form. Copies of the Order and blank informal brief form accompany respondent Barry's

(Footnote continued to next page)

Examining Appendix 3, one sees first that the Clerk sent the Order and blank informal brief form on or about April 13, 1988, and instructed the recipients that "parties electing to submit briefs shall mail their briefs to the Court, with copies to all parties, NO LATER THAN May 4, 1988." Hence, the fact that Smith's filing of his informal brief fell within the 30 day time limit established by F.R.A.P. 4(a)(4) is attributable largely, if not entirely, to the Clerk's instructions, rather than to any decision made by Smith.

A second material feature of Appendix 3 is the "Copies to" list. This list contained numerous persons

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(Footnote continued from previous page)

1/ April 19, 1991 opposition to petitioner Smith's petition for a writ of certiorari.

connected to the case, including respondents' counsel. Smith asserts before this Court that his informal brief is the functional equivalent of a notice of appeal because it adequately apprised the respondents of Smith's intention to appeal. The fact that respondents ever received Smith's informal brief, however, would appear more a consequence of the Clerk having placed respondents' counsel on the "Copies to" list and having instructed Smith, both in the Order (paragraph 3) and in bold letters at the end of the blank informal brief, to send copies of the brief "to all parties in the case," than a consequence of any decision made by Smith. As the final pages of Smith's informal brief (attached as

Appendix 4)[2/] indicate, Smith sent copies to the precise list of persons set forth in the Clerk's "Copies to" list.

Another relevant feature of the Fourth Circuit's informal brief is that it consists of numerous questions propounded by the Fourth Circuit, with spaces left for the litigants' responses. Respondents deny that Smith's informal brief satisfied the specificity requirements of F.R.A.P 3(c). In any event, however, it is manifest that the content of Smith's informal brief was a function of the questions posed by the Fourth Circuit. This fact places in doubt whether the informal brief is properly characterized

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2/ A copy of Smith's actual informal brief may be found in the Joint Appendix to the Fourth Circuit appeal at app. 108.

as Smith's "action" for purposes of the functional equivalent doctrine.

The premise that underlies the functional equivalent doctrine, at least implicitly, is that the putative appellant has performed an act that approximates the timely filing of a valid and reasonably specific notice of appeal. The only acts Mr. Smith performed in this instance with respect to his informal brief, however, were to respond to questions posed by the Fourth Circuit and to comply with explicit instructions from the Fourth Circuit regarding the filing and service of his informal brief. These acts do not manifest the degree of control and intention necessary to justify accepting Smith's informal brief as a surrogate for his notice of appeal.

A final consideration bears mention. It appears that only four of

the circuits -- the Fourth, Sixth, Ninth, and Federal Circuits -- provide for the filing of informal briefs. Counsel for respondents have looked with care through the caselaw and local rules and internal operating procedures of all other circuits and not found any rule or procedure comparable to the informal brief procedure. This informal brief procedure, at least in the Fourth Circuit, is set in motion promptly and, as this case illustrates, it can easily be set in motion by a premature or otherwise defective notice of appeal. Were this Court, therefore, to accept appellate briefs generally as surrogate notices of appeal, this holding would undoubtedly benefit pro se litigants in the four mentioned circuits more than other types of litigants and more than litigants in the other circuits. The goal of procedural and jurisdictional

uniformity within the federal judicial trial system is ill-served by such a result.

III.

SMITH DOES NOT MERIT THE SOLICITUDE NORMALLY AFFORDED PRO SE LITIGANTS

Smith contends that his pleadings should be treated with solicitude because he was a pro se litigant. Pet. Brief at 23 n.14. It is true, certainly, that this Court has recognized that pro se litigants, and particularly incarcerated pro se litigants, often labor under numerous limitations that, in fairness, a court must take into account. See Houston v. Lack, 487 U.S. 266, 270-72 (1988); Fallen v. United States, 378 U.S. 139 (1964). The factors justifying solicitude toward pro se litigants, however, are lacking in this case.

The fundamental premise underlying special lenience for pro se litigants is that the litigant has "done all he could do" to comply with the rule in question. Thus in Fallen a criminal defendant seeking to appeal had deposited his notice of appeal with prison authorities for mailing two days before the 10-day filing deadline. During the prior eight days the defendant had been ill and confined in a hospital, where he was not permitted to have visitors or afforded the opportunity to secure an attorney. The defendant's notice of appeal did not arrive at the clerk's office until four days after the deadline. On these facts this Court concluded that "[s]ince petitioner did all he could under the circumstances, we decline to read the Rules so rigidly as to bar a determination of his appeal on the

merits." 378 U.S. at 144. This Court reached a similar conclusion on somewhat similar facts in Houston. See 487 U.S. at 276.

The fact patterns in Fallen and Houston do not correspond to the present one. Smith did not "do all he could do" to comply with Rule 3's notice of appeal requirement. Smith obviously understood at least the rudiments of filing a notice of appeal, since he filed a notice of appeal pro se on March 22, 1988. Thereafter, on April 21, 1988 he received a letter from Leo P. Hylan, his attorney at trial, telling him that this notice of appeal was premature and thus void. Joint Appendix at 17. Mr. Hylan advised Smith that he had until May 13, 1988 to file a new and valid notice. For all that appears in the record, Smith, on receiving this admonition, had

abundant time to comply. He did not do so.

Smith asserts that this admonition from Mr. Hylan should be discounted or ignored because at the time Smith received Mr. Hylan's letter no "genuine attorney-client relationship" existed. Pet. Brief at 24 n. 14. The critical fact, however, is that Smith was informed that his March 22 notice of appeal was premature and void from a person who Smith had reason to believe understood such matters. Smith ignored Mr. Hylan's advice. However broadly one might wish to interpret the doctrine of special lenience for pro se litigants, a pro se litigant must be held to some degree of responsibility for his acts or failures to act, particularly when he, in fact, received timely and accurate advice from his former counsel.

IV.

EVEN IF SMITH'S INFORMAL BRIEF WERE DEEMED A NOTICE OF APPEAL, THE BRIEF FAILS TO SATISFY THE SPECIFICITY REQUIREMENTS OF FEDERAL RULE OF APPELLATE PROCEDURE 3(C)

Even were this Court to deem Smith's informal brief a proper substitute for a notice of appeal, Smith has not thereby established that the Fourth Circuit had jurisdiction over Smith's appeal. Where, as here, pre-trial motions and the trial have generated multiple appealable judgments or orders, a party wishing to appeal must designate from which of the judgments or orders it is appealing. This specificity requirement is contained in F.R.A.P. 3(c), which states in relevant part:

> Content of the Notice of Appeal. The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment,

> order or part thereof appealed from; and shall name the court to which the appeal is taken.

Compliance with F.R.A.P. 3(c) is a jurisdictional prerequisite. Torres, 487 U.S. at 317.

This Court in Torres, in addition to establishing that compliance with Rule 3(c) is a jurisdictional prerequisite, also set forth a standard by which such compliance is measured. It is one of literal and exact compliance. This Court recognized that this exacting standard may lead to harsh results, but held that this harshness was "imposed by the legislature and not by the judicial process." Torres, 487 U.S. at 318 (quoting Schiavone v. Fortune, 477 U.S. 21, 31 (1986)).

The best way to apply the Torres standard to the present facts is by a comparison of the language there found inadequate with the language from

Smith's informal brief that he contends satisfies Rule 3(c). In Torres the critical words were "et al.," used in the notice of appeal to designate the parties taking the appeal. The Court held that these words did not give fair notice of the specific individual or entity seeking to appeal, and thus the jurisdictional and specificity requirements of Rule 3(c) were not met. 487 U.S. at 317. In the present case the informal brief proposed by Smith as satisfying Rule 3(c)'s requirements contains not one reference to Dr. Barry or to the district court's December 26, 1984 Order dismissing Dr. Barry, nor does it make any specific reference to the district court's February 29, 1988 Order entering judgment in favor of the prison guards on Smith's deliberate indifference claim.

To establish compliance with Rule 3(c), Smith relies entirely on his request in the informal brief for "[a] new trial on all issues triable by jury." This language, however, can hardly be interpreted as referring specifically to the Order dismissing Dr. Barry. That Order was not an "issue triable by jury." The issue regarding dismissal of Dr. Barry had been decided by Judge Black long before any jury had been empanelled, and Smith knew this.

Nor does this uncertain phrase, read together with Smith's other allegations in his informal brief, satisfy Rule 3(c)'s specificity requirement with respect to the February 29, 1988 Order dismissing the prison guards. Reading the informal brief as a whole, it is apparent that Smith's attention was concentrated on an alleged collusion between his attorney and the

defendants' attorney that purportedly led to the suppression of allegedly relevant medical records. There is no indication that that issue related in any way to the prison guards.

Smith cites the Supreme Court's decision in Foman v. Davis, 371 U.S. 178 (1962) to support his argument that the language in his informal brief is adequately specific. Foman does not support this conclusion. In Foman, a second notice of appeal which did not specifically designate the order appealed from was held to be effective to bring up the merits of the dispute, where the first, ineffective notice of appeal supplied the missing information; the Court held that both notices of appeal should be considered. 371 U.S. at 181. In the present case, by contrast, the first, ineffective notice of appeal not only fails to supply the

required specificity, it confirms that Smith did not intend to appeal the Orders dismissing Dr. Barry and the prison guards. Smith's premature and ineffective notice of appeal states that Smith intended to appeal from "the judgment/order . . . entered in this action on March 15, 1988." (Joint Appendix at 10.) The March 15, 1988 Order related to a motion for attorney's fees. (Joint Appendix at 2.) The order dismissing Dr. Barry was dated December 26, 1984, and entered on January 4, 1985. (Joint Appendix at 1.) The Order dismissing the prison guards was entered on February 29, 1988. (Joint Appendix at 2.)

It is true that, in line with Haines v. Kerner, 404 U.S. 519 (1972), a liberal construction of notices of appeal prepared by pro se litigants has been deemed appropriate. Yet some

limits to this liberality must be imposed. As the Fourth Circuit noted in Shah v. Hutton, 722 F.2d 1167, 1168 (4th Cir. 1983), with respect to F.R.A.P.4: "[t]he fact that plaintiffs are incarcerated and are proceeding pro se does not change the clear language of the Rule." Even if an informal brief were allowed to substitute for a notice of appeal, to go beyond this and read into the informal brief language it does not contain surely crosses the line from liberal construction to an impermissible elimination of jurisdictional requirements.

V.

WHAT SMITH DID OR FAILED TO DO TO SATISFY HIS REQUIREMENT OF FILING A VALID AND TIMELY NOTICE OF APPEAL, AND NOT WHAT RESPONDENTS MAY HAVE SURMISED REGARDING SMITH'S INTENTIONS TO APPEAL, DETERMINES THE FOURTH CIRCUIT'S APPELLATE JURISDICTION

Smith asserts that the fact that respondents filed informal briefs and that initially they did not address the deficiencies in Smith's notice of appeal demonstrates that respondents acquiesced in Smith's appeal and were not prejudiced by Smith's failure to file a valid and timely notice of appeal. Pet. Brief at 25-28. Smith contends that this alleged absence of prejudice should be a factor in determining the adequacy of Smith's informal brief as a surrogate notice of appeal. This contention is wide of the mark in thtee respects.

First, the respondents' filing of informal briefs was the result of obedience to instructions from the Fourth Circuit rather than a result of adequate notice from Smith regarding his intentions to appeal. The instructions respondents received from the Fourth Circuit with the blank informal brief form were captioned "ORDER TO PROCEED ON INFORMAL BRIEF." This Order advised the respondents that, unless they elected to file formal briefs, "the case shall be submitted . . . on informal briefs." The respondents were faced with instructions in peremptory language from the Fourth Circuit, and they responded accordingly.

Second, on April 28, 1988, when Dr. Barry submitted his initial informal brief, the Fourth Circuit's decision in Calvert v. Sharp, 748 F.2d 861 (4th Cir. 1984), cert. denied, 471 U.S. 132

(1985), was good law and entirely dispositive of Smith's appeal. Dr. Barry relied upon Calvert and, until Calvert was overturned, had little reason to present additional arguments.

Finally, and most importantly, Smith's filing of a valid and timely notice of appeal is a jurisdictional requirement. Harmless error analysis, therefore, is inappropriate. Torres, 487 U.S. at 317 n.3. The proper focus must be on what Smith did or failed to do to perfect his appeal, not on what other parties may have surmised about Smith's intentions. Smith filed neither a valid notice of appeal nor its functional equivalent, and whatever beliefs respondents may have had concerning Smith's intentions cannot cure this jurisdictional defect.

CONCLUSION

For the reasons set forth above, Smith's informal brief should not be deemed the functional equivalent of a notice of appeal. The Fourth Circuit therefore lacked jurisdiction over Smith's appeal, and its judgment dismissing Smith's appeal should be affirmed.

Respectfully submitted,

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Attorneys for Respondent
Barry

APPENDIX 1

Form 1. NOTICE OF APPEAL TO A COURT OF APPEALS FROM A JUDGMENT OR ORDER OF A DISTRICT COURT

United States District Court for the _____ District of _____

A.B., Plaintiff)
v.) File No. _____
C.D., Defendant)

Notice of Appeal

Notice is hereby given that C.D., defendant above named, hereby appeals to the United States Court of Appeals for the _____ Circuit (from the final judgment) (from the order (describing it)) entered in this action on the _____ day of _____, 19__.

(S)_____

_____
(Address)

Attorney for C.D.

APPENDIX 2

ADVISORY COMMITTEE NOTES TO 1979 AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PRODECURE

Rule 1. Scope of Rules

(a) SCOPE OF RULES. These rules govern procedure in appeals to United States courts of appeals from the United States district courts and the United States Tax Court [of the United States]; in proceedings in the courts of appeals for review or enforcement of orders of administrative agencies, boards, commissions and officers of the United States; and in applications for writs or other relief which a court of appeals or a judge thereof is competent to give. When these rules provide for the making of a motion or application in the district court, the procedure for making such motion or application shall be in accordance with the practice of the district court.

Advisory Committee Note

The Federal Rules of Appellate Procedure were designed as an integrated set of rules to be followed in appeals to the courts of appeals, covering all steps in the appellate process, whether they take place in the district court or in the court of appeals, and with their adoption Rules 72-76 of the FRCP were abrogated. In some instances, however, the FRAP provide that a motion or application for relief may, or must, be made in the district court. See Rules

4(a), 10(b), and 24. The proposed amendment would make it clear that when this is so the motion or application is to be made in the form and manner prescribed by the FRCP or FR Cr P and local rules relating to the form and presentation of motions and is not governed by Rule 27 of the FRAP. See Rule 7(b) of the FRCP and Rule 47 of the FR Cr P.

APPENDIX 3

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-7096

Smith v. Galley

[FILED: April 13, 1988
U.S. Court of Appeals
Fourth Circuit]

ORDER TO PROCEED ON INFORMAL BRIEF

This appeal having been filed in this Court and it appearing that at least one party is proceeding without counsel, IT IS ORDERED:

1. The case shall be submitted on the lower court record and, at the election of the parties, on informal briefs, the form for which is attached. Parties may, but need not, cite statutes and legal authority to support their contentions. Only the basic facts and issues need be set forth, as requested on the form. If a supporting memorandum

is essential to address the issues adequately, it may be attached to the briefing form.

The Court will review the entire record on appeal for possible meritorious issues; it will not limit its review solely to the issues raised in the parties' briefs.

2. The six-digit docket number appearing on the first page of this order shall be placed prominently on every paper filed by any party to this appeal, as well as on all correspondence addressed to the Court.

3. Parties electing to submit informal briefs shall mail their briefs to the Court, with copies to all parties, NO LATER THAN May 4, 1988.

4. The original and one copy of the parties' briefs shall be mailed to the Court, with first class postage

pre-paid and affixed, addressed as follows:

United States Court of Appeals
for the Fourth Circuit
United States Courthouse
10th and Main Streets
Richmond, VA 23219

5. Every document mailed to the Court by any party must bear a notation that a complete copy thereof was mailed to all other parties at the same time; the Court must receive the original and one copy of every such document. The notation must show the complete name and mailing address of the persons to whom the copies were sent and the date of mailing.

6. Extensions of briefing deadlines are not favored by the Court and are granted only for good cause stated in writing. Requests for extensions MUST BE RECEIVED BY THE COURT BEFORE THE EXPIRATION OF THE DEADLINE.

7. Transcript of trial proceedings WILL NOT be prepared at government expense except in those limited cases in which the Court concludes from the briefs, the claims of the parties, and the record that the appeal presents a substantial question that cannot be determined without a transcript.

8. The Court will not appoint counsel or schedule an appeal for oral argument unless it concludes, after having reviewed the case, that the appeal cannot be decided on the basis of the informal briefs and the record. Therefore, it is unnecessary to request the appointment of counsel or oral argument.

9. Appellants may, but need not, file a docketing statement within 10 days of filing of the notice of appeal.

The form and instructions should already have been provided to appellant by the district court.

JOHN M. GREACEN
CLERK

Copies to:

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Hagerstown, MD 21740

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

88-7096 Smith v. Galley
CA-83-3395-B

INFORMAL BRIEF

Directions: Answer the following questions about the appeal to the best of your ability. Use additional sheets of paper, if necessary. You need not limit your brief solely to this form but you should be certain that whatever you file answers the questions below. In any event, the court prefers short and direct statements.

1. Did the district court fail to consider important grounds for relief. If so, what grounds?

2. Did the district court incorrectly decide the facts? If so, what facts?

3. Do you think the district court applied the wrong law? If so, what law do you want applied?-

4. Do you feel that there are any other reasons why the district court's judgment was wrong? If so, what?

5. What action do you want the Court to take in this case?

6. If you think the Court should hear oral argument in this case, why do you think so?

_____
Signature
NOTARY NOT REQUIRED

IMPORTANT: A COPY OF THIS BRIEF AND ANY ATTACHMENTS MUST BE SENT TO ALL PARTIES IN THE CASE. PLEASE LIST BELOW THE NAMES AND ADDRESSES OF THE PARTIES WHO WERE SENT A COPY OF YOUR BRIEF, TOGETHER WITH THE DATES ON WHICH THEY WERE SENT.

APPENDIX 4

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

88-7096 Smith v. Galley
CA-83-3395-B

INFORMAL BRIEF

Directions: Answer the following questions about the appeal to the best of your ability. Use additional sheets of paper, if necessary. You need not limit your brief solely to this form but you should be certain that whatever you file answers the questions below. In any event, the court prefers short and direct statements.

1. Did the district court fail to consider important grounds for relief. If so, what grounds?

   (a) Yes. The court only appointed counsel to represent the Plaintiff on his 42.U.S.C. 1983 complaint. The plaintiff had filed on July 26, 1985, "Motion For Leave To File Amended Complaint or Supplemental Complaint" into the Court seeking counsel for his serious medical problems, and requesting a Preliminary Hearing. Requesting appointment of Counsel.

   (b) The Court appointed counsel and at trial The plaintiff counsel and the defendants' counsel concealed vital evidence ... See attached extra sheet, 1-b.

2. Did the district court incorrectly decide the facts? If so, what facts?

   It is Plaintiff contention that the Court and Jury was unable to rule fairly to the facts, and the awarding of damages in to Plaintiff, due to the facts that vital evidence (medical records, exhibits, witness, and other issues of extreme importance to my case.) was being suppressed by Plaintiff's counsel and the defendants' counsel. This suppression by both attorneys', of evidence, was done without my knowledge and against my wishes. The plaintiff had requested in his complaint to properly conduct his medical records in open court.

3. Do you think the district court applied the wrong law? If so, what law do you want applied?

   I don't know.

4. Do you feel that there are any other reasons why the district court's judgment was wrong? If so, what?

(a) A conflict of Interest; the lawfirm of WHITEFORD, TAYLOR & PRESTON, and plaintiff's counsel are affiliated to participants in plaintiff's previous lawsuit, which is the parties members. Thus, the plaintiff was denied his constitutional right to a fair and impartial trial for the reason that Plaintiff attorney failed to adequately and competently represent him; also, Plaintiff was denied his constitutional right to due process and equal protection of law. Thus, the plaintiff beleave this resulted in the Court being unable to render a fair decision in my case.

5. What action do you want the Court to take in this case?

(1) A new trial on all issues triable by Jury.

(2)(a) That Plaintiff's medical records are properly conducted in the Court. (b) The Court to investigate conflict of Interest. The plaintiff beleave that there were conspiracy acts by his attorney and defendants' attorney, to suppress plaintiff medical records; thus, leaving the Court and Jury unable to render a fair decision and/or verdict in the Plaintiff Case. (c) The Plaintiff beleave that the Court should review all evidence pretaining to this case, and the award of damages

which plaintiff do beleave was grossly inadequate ... See attached extra sheet; 5-d.

6. If you think the Court should hear oral argument in this case, why do you think so?

Yes, the Plaintiff do beleave in all fairness to his case, and for himself, his legal counsel, and/or representative, to be allowed to hear in open Court Plaintiff's medical records, presentment of all evidence, be it physical or oral, the Plaintiff do beleave that it will give the Court and Jury a clearer vision of Plaintiff's medical condition, that his counsel and defendants counsel suppressed from the Court by ruleing out.

/s/William Lewis Smith
Signature
NOTARY NOT REQUIRED

Dated: April 23, 1988

IMPORTANT: A COPY OF THIS BRIEF AND ANY ATTACHMENTS MUST BE SENT TO ALL PARTIES IN THE CASE. PLEASE LIST BELOW THE NAMES AND ADDRESSES OF THE PARTIES WHO WERE SENT A COPY OF YOUR BRIEF, TOGETHER WITH THE DATES ON WHICH THEY WERE SENT.

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88-7096 Smith v. Galley, et al.
CA-83-3395-B

William Lewis Smith
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Route 3, Box 4444
Hagerstown, MD 21740

ATTACHED - Extra Sheet from informal brief:

Continued; 1-b

... (medical records, exhibits, witnesses, and other issues of extreme importance to the Plaintiff's case.) thus, the Plaintiff beleave that the Court and Jury was unable to render a fair verdict and/or decision in his case. This suppression of evidence was done without his knowledge and against his wishes.

Continued; 5-d

... to the suffering the Plaintiff have been subject to, and what he is still enduring. (e). That a U.S. Federal Investigation by the U.S. Justice Department and U.S. Attorney, and to take legal action against all parties who are responsible for their conspiracy to commit fraud, wrong doing, malice, etc., etc., to the Plaintiff. (f). Appellant cost of this suit. (g). Such other and futher relief as law and justice may require.

/s/William Lewis Smith
WILLIAM LEWIS SMITH

Dated: April 28, 1988

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed by certification on April 28, 1988, to the following:

/s/William Lewis Smith
WILLIAM LEWIS SMITH

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APPENDIX 5

APPEAL AS OF RIGHT -- HOW TAKEN

FRAP 3.

(a) Filing the Notice of Appeal. An appeal permitted by law as of right from a district court to a court of appeals shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. Failure of an appellant to take any other step than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. Appeals by permission under 28 U.S.C. § 1292(b) and appeals by allowance in bankruptcy shall be taken in the manner prescribed by Rule 5 and Rule 6, respectively.

(c) Content of the Notice of Appeal. The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal. An appeal shall not be dismissed for informality of form or title of the notice of appeal.

(d) Service of the Notice of Appeal. The clerk of the district court shall serve notice of the filing of a notice of appeal by mailing a copy thereof to counsel of record of each party other than the appellant, or, if a party is not represented by counsel, to the last known address of that party; and the clerk shall transmit forthwith a copy of the notice of appeal and of the docket entries to the clerk of the court of appeals named in the notice. When an appeal is taken by a defendant in a criminal case, the clerk shall also serve a copy of the notice of appeal upon the defendant, either by personal service or by mail addressed to the defendant. The clerk shall note on each copy served the date on which the notice of appeal was filed. Failure of the clerk to serve notice shall not affect the validity of the appeal. Service shall be sufficient notwithstanding the death of a party or the party's counsel. The clerk shall note in the docket the names of the parties to whom the clerk mails copies, with the date of mailing.

APPEAL AS OF RIGHT -- WHEN TAKEN

FRAP 4.

(a) Appeals in Civil Cases.

(1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the Clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted.

(2) Except as provided in (a)(4) of this Rule 4, a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof.

(3) If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period last expires.

(4) If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.

FILING AND SERVICE

FRAP 25.

(a) Filing. Papers required or permitted to be filed in a court of appeals shall be filed with the clerk. Filing may be accomplished by mail addressed to ~~the~~ clerk, but filing shall not be timely unless the papers are received by the clerk within the time fixed for filing, except that briefs and appendices shall be deemed filed on the day of mailing if the most expeditious form of delivery by mail, excepting special delivery, is utilized. If a motion requests relief which may be granted by a single judge, the judge may permit the motion to be filed with the judge, in which event the judge shall note thereon the date of filing and shall thereafter transmit it to the clerk.

FILING AND SERVICE OF BRIEFS

FRAP 31.

(a) Time for Serving and Filing Briefs. The appellant shall serve and file a brief within 40 days after the date on which the record is filed. The appellee shall serve and file a brief within 30 days after service of the brief of the appellant. The appellant may serve and file a reply brief within 14 days after service of the brief of the appellee, but, except for good cause shown, a reply brief must be filed at least 3 days before argument. If a court of appeals is prepared to consider cases on the merits promptly after briefs are filed, and its practice is to do so, it may shorten the periods prescribed above for serving and filing briefs, either by rule for all cases or for classes of cases, or by order for specific cases.

APPENDIX 6

FOURTH CIRCUIT LOCAL RULE 34(b)
INFORMAL BRIEFS

Whenever an application for a certificate of probable cause from the denial of a writ of habeas corpus or an appeal taken from the denial of a motion under 28 U.S.C. § 2255, or any pro se appeal shall be filed, the Clerk shall notify the appellant that he may file, within twenty-one days after receipt of such notice, an informal brief, describing the grounds upon which he claims he is entitled to relief and setting forth the merits of his appeal. Any such informal brief filed by any party shall be considered, together with the record and other relevant papers, by the panel to which the proceeding has been referred.

Parties proceeding pursuant to this section shall be provided copies of this local rule by the clerk.

FOURTH CIRCUIT INTERNAL
OPERATING PROCEDURE 34.6

Informal Briefs. Local Rule 34(b) has established a procedure for the filing of "informal briefs" in certain cases. The informal brief may be submitted on a form provided by the Clerk and should provide specific information about the case in response to questions appearing on the form. The parties need not limit their briefs solely to the form. It is not necessary to cite cases in an informal brief. An additional supporting memorandum may be submitted if a party deems it necessary in order to address adequately the issues raised. Two copies of the brief and memorandum, if any, must be filed wit the Court and a copy mailed to opposing counsel.

Once an informal briefing schedule has been established the parties may file a formal brief only with the permission of the Court. The Court initially reviews cases that are informally briefed under its procedures set forth in Local Rule 34(a) pertaining to pre-argument review. The Court does not limit its review to the issues raised in informal briefs, but reviews the entire record on appeal for possible meritorious issues.

FOURTH CIRCUIT INTERNAL OPERATING PROCEDURE 46.5

Proceeding Pro Se. An individual may proceed without the aid of counsel, but should so inform the Court at the earliest possible time. In any pro se appeal, the Clerk shall notify the parties that they shall file informal briefs as provided by Local Rule 34(b). The Court will independently review the record for meritorious claims and will also consider the need for the appointment of counsel when reviewing the appeal under Local Rule 34(a). Cases involving pro se litigants are ordinarily not scheduled for oral argument.

APPENDIX 7

28 U.S.C. § 2074. RULES OF PROCEDURE AND EVIDENCE; SUBMISSION TO CONGRESS; EFFECTIVE DATE

(a) The Supreme Court shall transmit to the Congress not later than May 1 of the year in which a rule prescribed under section 2072 is to become effective a copy of the proposed rule. Such rule shall take effect no earlier than December 1 of the year in which such rule is so transmitted unless otherwise provided by law. The Supreme Court may fix the extent such rule shall apply to proceedings then pending, except that the Supreme Court shall not require the application of such rule to further proceedings then pending to the extent that, in the opinion of the court in which such proceedings are pending, the application of such rule in such proceedings would not be feasible or would work injustice, in which event the former rule applies.

(b) Any such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress.